

# **Submission to the Australian Competition and Consumer Commission on its Discussion Paper on NBN Wholesale Service Standards**

**Department of Communications and the Arts**

**5 March 2018**

The Department of Communications and the Arts (the Department) welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (ACCC) discussion paper on NBN Co Limited's (nbn) wholesale service standards. The ACCC notes that its decision to launch the inquiry into nbn's wholesale service standards stems from complaints raised by both consumers and nbn's wholesale customers. The Commonwealth is making a significant investment in the National Broadband Network (NBN) to deliver better broadband to all Australian consumers and improve retail competition. It is therefore critical that any systemic issues leading to a poor consumer experience are identified and resolved.

The Australian telecommunications market is best described as being in a state of transition. nbn is undertaking the largest physical overhaul of Australia's communications network in more than a generation – nbn has now reached peak construction with close to half a million homes connected in the 2017 December quarter. At the same time, the telecommunications market is being structurally separated, and the Government and nbn have recently introduced a range of practical measures to improve consumer outcomes.

The enormous changes occurring on a structural level in the industry suggest that any further intervention must carefully consider the possibility of unintended consequences. It is not clear to the Department that prescription of a wholesale standard by the ACCC is required at this time, or that this would necessarily lead to a net consumer benefit.

nbn has reached the peak construction period. In this context, nbn's new connections should be treated differently than standards relating to faults and repairs. It is necessarily the case that a different regulatory environment will apply to nbn when the network is complete compared to when the network is being deployed. Indeed, when the NBN is complete, it may be appropriate for stronger connection and fault repair standards to be applied to it.

nbn has prescribed standards in its new Wholesale Broadband Agreement (WBA) that balance a good wholesale experience with the need to deploy the network at pace. Intervention by the ACCC at this time may risk disrupting that balance. Therefore, ACCC intervention should be initiated only if it becomes apparent that the standards that apply in nbn's new WBA are ineffective. The package of practical measures targeting consumer experience improvements put in place by the Government, regulators and nbn are yet to run their course. We suggest that the ACCC should ensure it is in a position to monitor the impacts of these initiatives — which were progressively announced in recent months — prior to intervening at the wholesale level. This will allow the ACCC to identify any systemic problems and impose effective regulatory solutions.

More detailed reasons in support of our views are outlined further in the remainder of this submission, and cover:

1. The scale of the nbn rollout
2. Supply chain complexities and data limitations
3. Existing wholesale standards and Customer Service Guarantee considerations
4. Commercial incentives on nbn as a wholesaler
5. Practical measures being introduced to improve consumer outcomes

## **1. The scale of the NBN rollout**

In considering intervention, it should be acknowledged that nbn is in the midst of completing one of the largest and most complex infrastructure projects in Australia's history. For instance, in the third quarter of 2017, close to 175,000 premises switched services to the NBN per month, compared to around 93,000 per month in the third quarter of 2016. This has inevitably given rise to supply chain issues that affect consumer outcomes. The industry as a whole has identified these issues and is working collectively on vast array of process improvements.

All large transitions involve disruption that may lead to consumer concerns. Transition periods have historically resulted in spikes in consumer complaints associated with major technological change such as the introduction of fixed broadband (circa 2004) and mobile internet (circa 2008).

Consequently, the volume of complaints needs to be contextualised against the broader rollout. The ACCC's discussion paper refers to the Telecommunications Industry Ombudsman's (TIO) *2016-17 Annual Report*. By the end of 2016-17, 2.4 million users were connected to the NBN (up 1.3 million – a 121 per cent increase from 2015-16). Of the 2.4 million connected, 27,195 raised a complaint – or 1.1 per cent, tracking marginally less than 1.2 per cent on complaints numbers of 2015-16 despite the network more than doubling in size. Of the total number services provided by June 2017, complaints relating to network faults were less than 0.7 per cent as a proportion.

Likewise, nbn reports that the NBN experience for the majority of customers is generally positive, with 85 per cent of consumers reporting that their service meets or exceeds their expectations. This result is in the context of a massive and inherently disruptive network migration process. And as nbn has publicly acknowledged, this is simply a base from which to deliver higher levels of satisfaction. The rollout is in many respects a once in a generation event – given the substantial focus and resources devoted to the rollout, once the rollout is complete, it would be appropriate for more stringent standards to apply from when nbn enters a 'steady-state'.

Further, most connections are taking place in a fixed-line brownfields environment where legacy services are generally in place until the NBN is successfully connected. This means consumers can have ongoing voice and broadband connectivity and almost all have access to mobile communications. Recently announced measures by the ACMA will further support service continuity. While poor consumer experience cannot be accepted or excused, measures are already in train to limit the prevalence and practical impacts on consumers of short term service disruptions.

## 2. Supply chain complexities

As the ACCC acknowledges in its paper, consumer outcomes on the NBN are a product of an end-to-end supply chain involving multiple parties. nbn is not solely or always the cause of complaints. While the TIO data are broken down by the top five types of complaints, it is not clear whether these relate to wholesale network issues or matters within the responsibility of a Retail Service Provider (RSP).

In mid-2017, the Minister for Communications commissioned the Australian Communications and Media Authority (ACMA) to investigate NBN consumer experience concerns. This research is outlined in the ACMA's paper, *Migrating to the National Broadband Network – the Consumer Experience* (the ACMA report), which was released in December 2017.<sup>1</sup> The ACMA report highlighted that the handling of complaints is a key consumer complaint in itself. The handling of complaints is made difficult by the complexity of the broadband supply chain. Measures designed to address this include, recent changes to the TIO Terms of Reference to strengthen the obligation on its members (not just the provider against whom a complaint has been lodged) to provide information requested by the TIO in order to resolve a complaint and to cooperate with TIO decisions, and the recently announced ACMA Standards.<sup>2</sup>

The ACMA report also indicated that at the time of the survey, the technology with the highest proportion of complaints and reported faults was the Hybrid Fibre Coaxial (HFC) network. In this sense, nbn's decision to pause the HFC rollout while it undertakes remediation and network optimisation activity in 2018 should be seen as a positive step towards recognising the importance of the consumer experience.

The ACCC's arrangements to collect data about the speeds and experiences of consumers through its Measuring Broadband Australia program will be helpful. This independent testing of broadband speeds is timely and will give consumers real-world results that indicate the broadband speeds they can expect with different RSPs. We would expect the data will assist in clarifying whether issues are attributable to nbn, RSPs or other parties.

The ultimate goal for all stakeholders is for nbn, RSPs and all other agents in the supply chain to improve their performance to deliver better consumer outcomes by addressing any deficiencies. It is unlikely that this will be achieved by solely tightening the regulatory framework to mandate non-price terms in the supply of wholesale nbn services. Rather, industry, the Government and regulators need to continue to work together to improve immediate industry processes and develop a robust longer term framework.

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<sup>1</sup> More information on how the ACMA is working to improve the NBN consumer experience, including a link to the *Migrating to the National Broadband Network – the Consumer Experience* is available at [www.acma.gov.au/theacma/improving-the-NBN-consumer-experience](http://www.acma.gov.au/theacma/improving-the-NBN-consumer-experience)

<sup>2</sup> More information on these changes is available at [www.tio.com.au/publications/news/revised-terms-of-reference-published-today](http://www.tio.com.au/publications/news/revised-terms-of-reference-published-today).

### **3. Existing wholesale standards and Customer Service Guarantee considerations**

The ACCC's discussion paper focuses on nbn's current WBA (the WBA3) provides standards for nbn's Ethernet service, which supports both broadband and telephony. While the Customer Service Guarantee (CSG) applies to retail voice services, nbn's service levels also cover broadband and, therefore, in many ways go beyond the historic protections for consumers. It may also be worth pointing out that the CSG was first applied many years after the voice copper network was fully deployed.

The matters covered by nbn's service level framework, including connection time, restoration time and appointment keeping, are generally consistent with those covered in the CSG framework, noting that connection timeframes are an area of inconsistency and in particular timeframes for standard connections and unserviceable (Service Class 0/Service Class 13) premises. nbn is systematically deploying a national network over several years, and consumers are able to maintain access to voice services delivered over legacy networks. In the Department's view, broadly aligning the WBA3 with the CSG represents a reasonable starting point given the current state of the network rollout.

While nbn's wholesale customers may not always agree with the various rules applying to the operation of the service standards, the rules are not necessarily unreasonable, particularly in the context of the stage of nbn's rollout. It is up to nbn to provide a rationale on why it has chosen to include specific terms and conditions in WBA3, and these need to be considered on their merits, and in the context of a network still under construction. It may be that, when the NBN is complete, stronger connection and repair timeframes could be considered, for example, taking into account the greater availability of network infrastructure.

nbn has established terms in WBA3 to rebate its customers when specific performance objectives are not met. In terms of the service levels offered under WBA3, for nbn's wholesale customers can receive:

- compensation for CSG liabilities where it can be shown that nbn was responsible, or partially responsible, for missed timeframes; and
- \$25 per customer rebates once performance objectives for specific service standards, broadly based on the CSG standards, fall below 90 per cent.

The ACCC notes in its discussion paper that wholesale customers are concerned about difficulties in claims procedures, the time to receive reimbursements, difficulties in apportioning costs between parties, and the need to take steps to avoid CSG liability.

It is reasonable for nbn to ask its wholesale customers to demonstrate that it was the cause of CSG timeframes being missed before making CSG compensation payments. It may be that faults are wrongly attributed by RSPs to nbn. Not requiring RSPs to demonstrate nbn's fault may establish the perverse incentive of allowing them to ignore consumer complaints in the knowledge that if they do become liable for CSG payments then nbn will cover the cost. Having noted this, if it is possible to implement more streamlined and automated approaches for attributing responsibility for missing CSG timeframes then these should be investigated.

A number of retail providers ask their customers to waive the CSG. In these circumstances, it

would be inappropriate for rebates or compensation to be paid to retail providers unless effective pass-through mechanisms were in place to ensure payments flowed through to end-users. The ACCC does not have the appropriate regulatory powers to deliver this, which underscores the need to consider service standards across the whole chain of delivery.

#### **4. Commercial incentives on nbn as a wholesaler**

nbn has incentives to offer high levels of service and to deploy its network in a timely manner. Competition from alternative networks, particularly mobile and to a lesser extent fixed line alternatives in urban areas, means that nbn's revenues and, therefore, profitability will be negatively impacted unless it can offer a high performance and reliable product. Further, as Australia's largest Government Business Enterprise, nbn is subject to intense public, political and regulatory scrutiny.

Additional financial penalties beyond those already committed under WBA3 for issues such as delays, faults and missed appointments may provide some added incentive for nbn to improve its performance, but risk compromising nbn's broader goals to improve consumer outcomes. The timely completion of the rollout is also a relevant consideration.

For new penalties to be effective incentives, they would need to be relatively high. As the ACCC has clearly identified, a wider range of requirements and tighter service level requirements would come at a cost and may do so at the expense of both the consumer and the taxpayer. Higher penalties at a time when nbn is both a builder and operator of the NBN could slow the network rollout or disproportionately divert operational focus. The impact may actually delay access to the NBN for large numbers of premises and put at risk the policy objective to have all Australians able to access the network by 2020, and ultimately reduce consumer welfare.

Conversely, nbn could push ahead at pace and run the risk of accruing high penalty payments, reducing its ability to invest in other areas of its business, including process improvements, that improve the network and deliver better outcomes for all consumers. At its most extreme, higher penalties could raise nbn's need for capital without improving outcomes. Ultimately, either consumers or taxpayers funding the NBN would need to fund these penalties. As such, this is an issue for the broader community and not one that can be considered solely through the lens of a Part XIC process.

If payment regimes fail to act as incentives, they then become rebates, compensation or penalties. This requires careful consideration of the rationale for such payments, in terms of benefits, harms and costs. In all cases, issues arise about appropriate payment levels and the circumstances in which they should be made. The Department considers these are significant issues with a broader context and potentially broader implications.

The ACCC has queried nbn's use of non-binding operational targets. nbn monitors performance against these and has indicated they may be developed into a more formal service level assurance in the future. As a wholesale provider, nbn is not bound to offer any performance targets. Rather, it has established these as a commercial response to the needs of its wholesale customers.

## **5. Practical measures being introduced to improve consumer outcomes**

In practice, consumers will benefit most from having services rather than compensatory payments. Priority therefore needs to be given to improved delivery of services on the ground. Several initiatives are in train to achieve this.

nbn has been working with RSPs to improve the NBN consumer experience through its Future of Customer Experience (FoCX) program. The program focusses on refining the processes underpinning seamless, consistent connections with minimal disruption for consumers. It includes initiatives such as the establishment of dedicated teams to work alongside RSPs to improve outcomes for customers in greenfields sites and business customers, and to enhance the management of consumer appointments. Most recently, these industry-wide efforts have resulted in significant and real improvements in progressing orders for connections and appointment practices. The Department understand that details on these improvements will shortly be published by nbn.

As noted above, acknowledging there have been issues in the HFC footprint, nbn has paused its rollout so these can be corrected and consumer experience during the connection process and in using the service will be markedly improved.

nbn has been actively considering its pricing as a way to further improve the consumer experience. nbn's 'Focus on 50' promotion is producing improvements in service performance and consumer experience. To the extent that 14 per cent of the complaints to the TIO cited above were due to 'slow Internet speed', real world initiatives like this can help fix them. nbn appears to have responded positively without any regulatory intervention. Given that nbn's Focus on 50 pricing is occurring in a promotional period, we consider it should be allowed to run its course. Regulatory intervention could disrupt the positive early feedback on this commercial response.

The Government is confident that the ACCC's initiative in relation to broadband performance monitoring and accurate broadband advertising is already leading to improvements along the supply chain, particularly in relation to complaints about 'slow Internet speed'.

Actions to improve processes are also being bolstered by a range of other targeted Government interventions. In particular, the Government's \$8.7 million package over three years from 2017-18 for the ACMA will enhance consumer protections through clarity of information, complaints handling standards, service continuity and service quality. As already noted, the work being undertaken ACMA and the ACCC to investigate issues relating to the NBN customer experience through research and data collection has a significant role to play.<sup>3</sup>

Finally, in late December 2017, the Government announced it will require nbn to establish a consumer experience dashboard to report nbn connection, fault repair and service delivery performance. This will provide further transparency for consumers and accountability for nbn. Public reporting gives nbn the incentive to improve its wholesale performance, and assist the Government, industry, regulators and consumers to identify where issues lie.

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<sup>3</sup> More information and links on the Government and regulators' initiatives outlined above are available at [www.minister.communications.gov.au/mitch\\_fifield/news/industry\\_action\\_to\\_address\\_nbn\\_migration\\_issues#.W\\_oD\\_OY0Uk6Y](http://www.minister.communications.gov.au/mitch_fifield/news/industry_action_to_address_nbn_migration_issues#.W_oD_OY0Uk6Y)

## **Conclusion**

This submission has highlighted the complexities of the NBN rollout and the significant transition the telecommunications market is currently undergoing to give effect to structural separation and a next generation broadband network for Australia.

All stakeholders wish to ensure positive consumer experiences on the NBN. The Government, regulators, nbn and RSPs are initiating measures to improve outcomes on several levels. The ACCC is encouraged to monitor the market and to clearly identify the sources of outstanding problems rather than imposing wholesale standards in the short term and risking destabilising nbn's efforts to balance consumer outcomes against meeting its network deployment goals. If systemic problems remain then, with this information, these issues can be addressed with targeted intervention that minimises market distortions.